CHAMPERTY AND MAINTENANCE IN THE UNITED STATES.

IT IS not the purpose of this article to review the statutes of the various states on the subjects of barratry, champerty and maintenance, but rather, to discuss the question as to how far the general principles of common law and the old English statutes which inveigh against these evils, have been recognized as a part of the law of this country independently of statutes. Nor is it the intention of the writer to consider the question from the criminal viewpoint, because so many of the states have adopted criminal codes which undertake to define all criminal offenses punishable therein, and therefore all crimes punishable in such a state must be defined and determined by the particular code thereof. A reference to most of the criminal statutes of the various states (where such statutes exist at all) in reference to these subjects will show, however, that they are so restricted in their terms as to be easily evaded, and to fall short of protection against the many evils that were so carefully guarded against under the common law of the early English statutes. In fact, the law has been either so weak or so poorly enforced here, that there has grown up throughout the entire country, particularly in the cities, a class of persons who engage in a regular business of buying interests in lawsuits and of financing the prosecution thereof. They conduct their "barter and sale" in the temples of justice without blush of shame and boldly assert that they have as much right to deal in lawsuits as a merchant has to deal in dry-goods or groceries.

While there has been some question as to whether the rules against champerty and maintenance are referable to the common law or to the early English statutes, the great weight of authority seems to recognize that they are both offenses punishable at common law. Of course, as stated before, any criminal punishment for these offenses in this country must generally depend on particular statutes of the various states. But

independently of the question of punishment as criminal offenses, it is important to consider how far, if at all, the general rules that were applied in England against champerty and maintenance are in force in this country, for upon their recognition as a part of the common law may depend the validity or non-validity of champertous contracts, or the question as to whether an action for damages could be enforced against persons engaging in such practices, or whether injuries caused or threatened thereby might be enjoined. That an action for damages for maintenance lies at common law has been recognized by a number of cases in this country.[1]

There are cases in this country however which boldly assert that the law against champerty and maintenance as in force under the common law and the early English statutes, never became a part of the law of this country, that the reasons which existed for their enforcement in England never existed here, and that the principles involved had not "been regarded as necessary or applicable to the condition of our people." It is believed that a careful examination of these opinions will show that the court in each instance had before it a question involving one of the exceptions hereinafter referred to and that such expressions are, in a sense at least, dicta on the question as to whether the general principles of the law of champerty and maintenance as known in England, subject to the modifications hereinafter mentioned, are in force in this country.

A rather careful review of the American authorities leads the writer to the opinion that while the rigid rules as to champerty and maintenance that were applied under the common law in England, have been modified in this country, yet they have by no means been abandoned, and that the general principles of the common law that apply to these offenses, with the modifications hereinafter named, are still in force here.

There are four distinct and important modifications of these rules which are generally recognized throughout this country

[1] Goodyear Dental Vuncanite Co. *v.* White, Fed. Cas. No. 5602; Fletcher *v.* Ellis, Fed. Cas. No. 4863a; Commonwealth *v.* Davis, 11 Pick. (Mass.) 432. See collection of cases in 5 Am. & Eng. Ency. of Law, 821, 822.

either by statutes or by decisions of the courts independent of the statutes, viz: (1) The right to assign an interest in a chose in action; (2) the right of an owner of land out of possession to sell his interest therein; (3) the right of an attorney to prosecute a suit for a contingent fee of an interest in the recovery, where there is no solicitation of the business on his part and no agreement to bear the expenses of the litigation; and, (4) the right to assist a person in distress from motives of charity to prosecute a just claim.

It may appear to some at first blush that these exceptions are so broad that they practically destroy the entrie fabric of the common law of the subjects named. But such is not the case, and while there is danger of abuse under one or two of these modifications the most flagrant evils that exist in this country in reference to this matter, are not due to them and are violative of other principles that are not necessarily included in the exceptions named.

It may be conducive to clearness in this discussion to refer here to the definition of barratry, champerty and maintenance as understood at common law.

Barratry was "the offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." [2]

It seems that the purchase of a single claim, with intention of suing upon it, did not amount to barratry, but to constitute the offense there must have been a practice of fomenting suits.[3]

There is a common impression that this offense applies only to lawyers and some of our statutes apply more particularly to them but under the common law it was not so confined and generally our statutes include other persons as well. Champerty was defined as the unlawful maintenance of a suit by a person having no interest therein, in consideration of an agreement for a part of the thing in dispute, or some profit out of it. When a person advanced money to support a suit in which he had no interest, he was guilty of maintenance—the difference being that in champerty he received an interest in the thing in suit while in maintenance he did not.

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[2] 4 Flaxman's Comm. 134; Coke on Littleton, 368.

[3] Bouvier's Law Dictionary, 222.

In Brown *v.* Bigne,[4] it was held that a bona fide agreement by a third person to supply funds to carry on a suit was not champertous where such person was induced by the plaintiff to enter into such contract because the plaintiff was unable to carry on the litigation. In this case, however, the court said that while the law of champerty and maintenance as recognized at common law had been modified in many respects in this country, still the "doctrine, in a more or less modified form, is generally recognized in a great majority of states of the Union, and contracts which come within the mischief to be guarded against in the administration of justice are held to come within the rule." The court further said:

> "A fair *bona fide* agreement by a layman, to supply funds to carry on a pending suit, in consideration of having a share in the property is recovered, it seems to us, ought not to be regarded as *per se* void, either on the grounds of champerty, as now understood, or of public policy. * * * But agreements of the kind above suggested should be carefully watched and closely scrutinized, when called in question, and if found to have been made, not with the *bona fide* object of assisting a claim believed to be just, but for the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpose of gambling in litigation, or to be so extortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them. * * * The doctrine of champerty, to the extent that furnishing aid in a suit under an agreement to divide the thing recovered is *per se* void, we think ought not to prevail, when such aid is furnished by a layman, but when such contracts are made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, they come within the analogy and principles of that doctrine, and should not be enforced. Gilbert *v.* Holmes, 64 Ill. 548; The Mohawk, 8 Wall. 153; Boardman *v.* Thompson, 25 Iowa 487." [5]

In the case of Dahms *v.* Sears,[6] the same court held that while an attorney might contract for a contingent fee, he could not purchase a claim for the consideration that he would prosecute

[4] 21 Ore. 260, 28 Pac. 11.
[5] 21 Ore. 260, 28 Pac. 11, 13.
[6] 13 Ore. 47, 11 Pac. 891.

it in his own name for a part of the amount recovered. In discussing the question of champerty and maintenance and reviewing the authorities, Judge Thayer said:

> "It is undoubtedly true that champerty and maintenance as they existed at the common law, and under a series of ancient statutes, like many of the other branches of the municipal law of England, have undergone great changes. They have been modified to suit the varied conditions of the people who adopted that system. That is entirely consistent with the philosophy upon which it is founded. Every rule it recognized and enforced was based upon a reason, and when that ceased the rule itself ceased. The various regulations which made up the body of the common law were established to prevent prevalent mischief, and when that end was accomplished the law was fulfilled; but, as long as the mischief continued, the remedy remained to check and control it. Many of the evils which the law was intended to remedy have been overcome by countervailing circumstances that have arisen, and, in effect, have been extinguished. So far, then, the law becomes obsolete; but it is not dead. It has a spirit or principle which is endowed with immortality; and if the evils revive in any form, it would be present to counteract their pernicious effects. Many salutary principles of the law originated in feudal times, and grew out of feudal customs, and still flourish, although the subjects they were intended to regulate have been long since swept away So with the law against champerty. Its framework is broken down and decayed, but the principle which condemned the buying of a lawsuit in order to secure its fruits will endure as long as the desire to promote good order and insure justice controls the actions of mankind. An attorney, under our system, has a right to contract for a contingent fee, or for a percentage upon the amount recovered, but he cannot lawfully purchase a claim for the consideration that he will prosecute it in his own name for a part of the amount recovered. He has no right to become attorney and client at the same time. The courts will not aid him to carry out any such questionable scheme, or recognize the legitimacy of the attempted speculation. The assignment of the claim in question from Keltener to the respondent for the purposes disclosed on the face of the instrument was invalid, and he failed to establish a cause of action." [7]

[7] 13 Ore. 47, 11 Pac. 891, 898.

A number of very interesting cases involving the questions under discussion, have been before the Supreme Court of Minnesota. In these cases the record showed that one Huber had secured more than seventy contracts from persons having claims against a railroad company. These contracts authorized him to employ a lawyer to assist him, to prosecute the suits, and provided that he should be entitled to an amount equal to one-half of whatever sum might be collected in the matter, and that the claimant could not settle the claim without Huber's consent in writing.

The first case growing out of these contracts was that of Huber v. Johnson.[8] In this case one of the claimants had settled with the railroad without Huber's consent, and he brought suit against him for $75.00, the contract in this particular case having provided that if settlement was made without his consent, the claimant would pay him $75.00 within ten days. The defendant plead that the contract was void as being champertous and against public policy. The plaintiff, Huber, claimed it was not void because (a) it did not provide for an interest in the thing recovered but merely that the amount of his compensation was to be a sum equal to one-half the amount recovered, and (b) that the law against champerty was not in force in Minnesota.

The Supreme Court of Minnesota brushed aside the first contention by saying that it was "a distinction without a difference." The court then proceeded to deny the other contention and to hold that the common law rules as to champerty were in force in Minnesota, and in the course of its opinion, said:

> 'In the majority of the states it seems to be held that these rules, at least so far as adapted to our state of society, are still in force as a part of the common law, except so far as they have been changed by statute. In a number of states, however, it has been held that these early English statutes were never in force as a part of the common law, that they had their origin entirely in the state of society existing under the feudal system, and are wholly unsuited to our social and political system. So far as many of their provisions are concerned, this is doubtless true. But the essential principle upon which these statutes proceeded, and the evils and abuses at which they were

[8] 68 Minn. 74, 70 N. W. 806.

aimed, are as old as human society, and will continue as long as human society exists. The general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and pervert the remedial processes of the law. The principle upon which it proceeded was that contracts conducive of such results were against public policy. Blackstone speaks of men who are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering with other men's quarrels, as 'the pests of civil society.' This view was not peculiar to the common law. The Roman law animadverted with equal severity on this class of men and their practices. This class of men in the form of prowling assignees' and intermeddling speculators are unfortunately just as numerous, and their practices just as pernicious, as they ever were. It is no doubt true that the changes in the law making choses in action and rights of entry assignable, and giving parties the unrestricted right to agree with their attorneys as to the measure and mode of their compensation, have so emasculated the common-law rules against champerty and maintenance that it is difficult to determine how much, if anything, of the old English statutes on the subject remains in force. But that is a question which it is not necessary to consider. We do not think that any court, even of those which hold that these statutes are not in force, has ever gone so far as to hold, that contracts may not so manifestly tend to stir up strife and contention and vexatious and speculative litigation, and prevent the amicable compromise of claims between citizens, as to be void of grounds of public policy." [9]

After Huber had been defeated in the suit referred to, the attorney he had employed in connection with these contracts, tried his hand in court, and on the first appeal from an order sustaining a demurrer, secured a decision in the case of Gammons *v.* Johnson [10] to the effect that he might recover a *quantum meruit* notwithstanding the champertous nature of the contract secured by Huber. The court, however, seems to have proceeded upon the theory that the attorney had not been connected in any way with

[9] 68 Minn. 74, 70 N. W. 806, 807.

[10] 69 Minn. 488, 72 N. W. 563.

the champertous practice. The case was reversed and a new trial granted. On the second trial the defendant offered to prove that the plaintiff and Huber—who were strangers to the parties having the claims, and who had no object in intermeddling with the matter, except as speculators—entered into a systematic scheme to hunt up claims that would probably never have been asserted, to stir up wholesale litigation by inducing landowners to allow them to bring actions thereon, and to prosecute the suits at their own expense, indemnify their clients against the cost and expense of litigation, and accept, as their compensation, a share of what might be recovered. This evidence was excluded and the Supreme Court of Minnesota on appeal in the case of Gammons *v.* Johnson [11] held that this was error, and said:

"A course of conduct on the part of either an attorney or layman more obnoxious than this to public policy, as involving champerty, maintenance and barratry, cannot well be imagined. The old common-law rules on the subject of champerty have doubtless been much modified, but the essential principle upon which those rules existed, and the abuses at which they were aimed, still exist. The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial processes of law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy. It is doubtless the more modern doctrine that the mere taking a case on a contingent fee does not constitute champerty, and that it is not unlawful for an attorney to carry on a suit for another for a share or what may be recovered at least, unless he assumes the risks of litigation by indemnifying his client against all costs and expenses of the same. But the vice in the conduct of these parties lies deeper and much further back than merely entering into a champertous contract for their compensation for lawful services performed in the prosecution of suits legitimately instituted. Ac-

[11] 76 Minn. 76, 78 N. W. 1035.

cording to the facts alleged, and offered to be proved, it consisted of an unlawful and barratrous systematic scheme to work up and instigate wholesale vexatious litigation in the names of parties and concerning subjects to whom and which they were entire strangers, and in which they had no interest, except a speculative one in the pecuniary profit which they might derive from the litigation which they had instigated, and which in all probability never would have been instituted except for their officious intermeddling. The illegality of the conduct of the parties enters into the very inception of the scheme by which the litigation itself was instigated, and but for which it would never have existed. Even if the special written contracts regarding compensation be set aside or ignored, this original vice, in the very inception of the scheme, would still exist in its full force. To hold that a party can thus illegally stir up and instigate litigation, and yet obtain the benefits of it by ignoring the special contracts, and bringing suit upon a *quantum meruit* for services performed in prosecuting the litigation which he has unlawfully instigated, would be a travesty on justice, and to permit a party to do indirectly what he cannot do directly." [12]

The case was reversed for a new trial and on the next trial the attorney sought to show that he was not in any way a party to the procuring of the Huber contracts. The trial court submitted to the jury the question as to whether he was a party to or connected with the procurement of the illegal contracts, and the jury found that he was not, but regardless of this finding, the Supreme Court on appeal, in Gammons *v.* Gulbranson,[13] reversed the case and directed a judgment entered against him notwithstanding the verdict. It seems that the attorney had abandoned the original Huber contract, and had a new one made with himself, but the court said he did not accomplish the result he desired by "attempting to abandon the original contract and making a new one in furtherance of the unlawful scheme. Nor would it make any difference when a person became a party to such an illegal scheme. If he became a party to it at any stage of its execution, he would, in con-

[12] 76 Minn. 76, 78 N. W. 1035, 1037.
[13] 78 Minn. 21, 80 N. W. 779.

templation of law, be a party to it from its inception." The court further said:

> "It is impossible to conceive that, under these circumstances an experienced attorney could fail to understand that these contracts were the result of a systematic scheme on the part of Huber to work up and instigate wholesale litigation for mere speculative purposes." [14]

It is believed that the authorities cited fairly state the rule as generally recognized in most of the states and show that subject to the four exceptions above named, the old law of champerty and maintenance is still in force in this country. While some of the courts seem to recognize the right of a layman to assist another person in the prosecution of a suit and to take compensation for such assistance, yet they say it must be done through motives of assisting the claimant who is unable to prosecute the claim by himself, and not through motives of speculation or for the purpose of gambling in litigation, and where a person engages in such a business, and makes a systematic scheme of it, he comes within the condemnation of all the courts in this country so far as they have expressed themselves. In the case of Huber *v.* Johnson,[15] Judge Canty dissented from the opinion of the court on the ground, as stated by him, that the record in the case showed that it was an isolated act and that there was nothing in it to show that the party was engaged in the business of hunting up litigation. He makes it plain, however, that in his opinion if such a person were engaged in the business, his contract would be against public policy and the stirring up of litigation in this way would be a nuisance. He says:

> "But, while isolated transactions of such a character may not be champertous, or against public policy, a systematic prowling around and bringing to light of stale claims on which the original holders would probably never have asserted any right or taken any action, and the stirring up of such claims is a crying evil, which, in my opinion, is against public policy. Such stirring up of litigation may be regarded as

[14] 78 Minn. 21, 80 N. W. 779, 780.

[15] 68 Minn. 74, 70 N. W. 806.

> a species of nuisance. One isolated act or transaction might not constitute such a nuisance, while a series of such acts or transactions, or a practice of stirring up such litigation, would." [16]

To the writer it seems that the criminal statutes of the various states do not, as a rule, embody the principles of the old law against champerty and maintenance as fully as they should. It also seems that one or two of the exceptions above named could be limited by legislation without doing injustice to litigants. Such statutes could not be so framed as to still protect the weak, and yet elevate the practice of the profession of law and purify the administration of justice. The space allotted this article does not here permit of a further discussion of these questions, but they furnish material for the thoughtful student of the political and judicial history of our country.

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[16] 68 Minn. 74, 70 N. W. 806, 808.